

## DISCRETION OF EXECUTIVES

Do They Possess Any in the Enforcement of the Law?

## DEBATE BEFORE CURRENT TOPIC CLUB

Mr. Rosewater Argues in the Affirmative and Judge McCulloch in the Negative—Local Illustrations Freely Cited by the Speakers.

An unusually large number attended the meeting of the Current Topic Club at the Young Men's Christian Association lecture room last evening, to hear the debate between Mr. Rosewater and Judge McCulloch on the question, "Should an Executive Exercise Any Discretion in the Enforcement of the Law?"

Owing to the fact that Major Halford had been suddenly called out of the city on official duty, the regular current topic review was omitted, and Mr. Rosewater was at once introduced by President Durfee to speak on the affirmative side of the question.

He said that while he had accepted an invitation to represent the affirmative side in the debate, he did not appear as the champion or the defender of any particular system of administration, but rather as the exponent of the principle that it was right for an executive to exercise discretion in the enforcement of laws. Proceeding to a discussion of the question, he said:

MR. ROSEWATER'S ARGUMENT.

It is decreed by the constitution of Nebraska that the supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.

Before assuming the functions of chief executive the governor is required to make oath that he will support the constitution of the United States and the constitution of the state, and that he will faithfully discharge the duties of his office according to the best of his ability.

Is the governor to have no discretion in the discharge of his duties? Is he under obligation to enforce every law on the statute books regardless of the consequences or circumstances? Or is he permitted in the discharge of his duties to exercise common sense and discretion? The question is, what line of absolute enforcement wherever the conditions and public sentiment compel a divergence? Do we custom and usage, which make law, fully demonstrate that the executive must often exercise discretion in the interest of good government as well as for maintaining popular respect for the law?

In examining the statute books we find obsolete laws, impracticable laws, impracticable laws and pernicious laws.

The statutes of Connecticut and other New England states have for two centuries been encumbered with what are known as Puritan "blue laws" which have long since become obsolete.

I need only instance a few of these laws to convince any rational mind that their enforcement in our day would only tend to bring ridicule and odium upon law in general.

No food or lodging shall be offered a Quaker, Advertiser or other heretic.

If any person shall sell Quaker beer, he shall be banished and not suffered to return on pain of death.

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No one shall travel, cook victuals, make beds, sweep house, cut hair or shave on the Sabbath day.

No woman shall kiss her children on the Sabbath day or fast day.

Whoever wears clothes trimmed with gold, silver or bone lace above 2 shillings per yard shall be presented by the grand jurors and the selectmen shall tax the offender on his estate.

No one shall read the common prayer book, keep Christmas or set days or play on any instrument, except the drum or fife.

Married persons must live together or be imprisoned in jail.

Who will contend that the present governor of Connecticut is bound to enforce these laws to the very letter? Does it not stand to reason that under existing conditions the enforcement is utterly impossible, and if attempted would be resisted and might even provoke violence and rioting?

The blue laws I have quoted are obsolete, and the following are still in force in Massachusetts:

Rogues and vagabonds, persons who use any juggling or unlawful games or plays, common pimps, idle persons, and persons who, without lawful employment, shall be deemed vagrants; uncleanly persons are exalted.

Tramps shall be punished by imprisonment in the house of correction, or by whipping, or by fine, or by any other means, for not less than two years. All idle persons not having visible means of support or who live without lawful employment shall be deemed vagrants and imprisoned not more than six months.

Inkeepers may refuse to supply food to strangers and travelers on Sunday.

Whoever travels on Lord's day, except from necessity or charity, shall be fined by a fine not exceeding \$10 for each offense.

Whoever keeping a house, shop, cellar or place of public entertainment or refreshment entertains therein on the Lord's day any person other than a stranger, or a stranger who lodges, or suffers such persons on such day to remain therein, or in the yards, orchards or fields pertaining thereto, drinking or spending their time in idle play, or in doing any secular business, shall be punished by fine. Now let me quote from the Connecticut statute:

Every person who shall engage in any sport or recreation on Sunday between sunrise and sunset shall be fined not more than \$4 nor less than \$1 for every offense.

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Christmas legal holidays. In the eyes of the law their observance is just as imperative as the observance of the legal Sabbath, which is Sunday, but public sentiment does not so regard them, and it would be impossible to enforce strict Sabbath observance on the Fourth of July, on Thanksgiving day, or on New Year's day. To be sure, our banking houses close, and there is a half holiday observance among business men on these days, but what vigilance people who complain of the lax Sunday observance think of firing cannon, guns, fire crackers and displays of fireworks on an ordinary Sunday?

I am aware, of course, that in the abstract it is expected that the executive, national, state or municipal, should exert all power at their command to enforce every law but we are dealing with conditions and not theories.

It is not manifest from what I have already stated that if the governor was impeachable for failing to enforce every law on our statute books that we should have a new governor for the last twenty-five years?

Let us now pass from the state to the municipal executive. Under the charter for metropolitan cities the mayor is the chief executive officer and conservator of the peace throughout the city. He has the superintendency and control of all affairs of the city, and it is made his duty to see that the provisions of the charter and ordinances are complied with.

The charter also provides that the mayor shall be active and vigilant in enforcing all laws and ordinances of the city.

QUESTION OF MAYOR'S DISCRETION.

Now, the question is has the mayor any discretion in the enforcement of the laws and ordinances as he finds them on the statute books? Is he in duty bound to enforce every law regardless of the pernicious and injurious consequences it might entail? I apprehend that no such construction can be rationally placed upon the duty of the executive.

The mayor is expected to enforce the laws against Sabbath breaking. The statutes provide that if any person above the age of 14 years shall be found hunting, fishing, shooting or quarring on Sunday he may be confined in the county jail for twenty days or fined not to exceed \$20, or both, at the discretion of the court. It would be easy enough to enforce the law against fishing and hunting, but how about quarring on Sunday? Suppose the mayor should direct the police to arrest every man who quarrels with his wife or his neighbor on Sunday? Suppose the mayor should cause the arrest of every man and woman who quarrelled on Sunday about sleigh riding or about the women in town who quarrelled on Sunday over their respective bonnets or dresses?

The law declares that every person above 14 years of age shall be liable to arrest on labor on Sundays, except charitable work and work as may be necessary, shall be guilty of a misdemeanor and subject to arrest and imprisonment for not more than 30 days.

Now, the question is, what is the duty of the mayor? Is he to enforce every law regardless of the consequences or circumstances? Or is he permitted in the discharge of his duties to exercise common sense and discretion? The question is, what line of absolute enforcement wherever the conditions and public sentiment compel a divergence? Do we custom and usage, which make law, fully demonstrate that the executive must often exercise discretion in the interest of good government as well as for maintaining popular respect for the law?

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fact, which every lawyer will admit to be fundamental, that the mayor is not expected to make complaints against gamblers and gambling houses any more than any other citizen. It is the duty of all law-abiding citizens whenever they know that a crime has been committed to enter complaint, and it will then devolve upon the public prosecutor to file information against every offender whenever he has become satisfied that a crime has been committed. The open gambling house, as it is now said to exist in Omaha, certainly affords much opportunity for enforcing the gambling laws, but the closed gambling house, Nobody but those who actually play and the cappers, dealers and keepers are permitted to remain in the gambling establishment, and the men who gamble will never testify against themselves. On the contrary the open gambling house admits spectators who are no way immune from the law. The open gambling house is a public nuisance and made to tell what they have seen and whom they have seen without criminalizing themselves. While professional gamblers may be suppressed, at least for a time, playing of social games for money and secret gambling in hotels and private apartments could not possibly be suppressed without an espionage that would be intolerable in any community.

## IN THE WORLD TO STAY.

The experience of ages has abundantly confirmed the prevailing belief among all well informed people that the social evil can never be stamped out. All that can be done is to keep it within bounds and under strict police surveillance. While the state police are making the routine keeping of houses of ill-fame a misdemeanor and subject the inmates to fines and imprisonment in jail, the charter of the city recognizes the discretion of the executive in the enforcement of this law.

Section 22 of the charter for metropolitan cities provides that no such construction shall have power to restrain, prohibit and suppress tippling shops, houses of prostitution, opium joints or dens, gambling houses, etc.

Now to restrain clearly implied to hold in check, to curb or to confine within certain limits. If it was the duty of the mayor absolutely to enforce every law on the statute books, the use of giving him power to restrain. The manifest intent of the law is to recognize existing conditions in metropolitan cities and leave to the mayor the exercise of discretionary power to suppress where suppression is possible or to restrain where suppression is impracticable. The so-called "blue laws" are a good example of this. The most common sense and common law agree with the ablest medical experts that every attempt to scatter this vicious class of people is a waste of time and money.

The January number of the Medical Age, published at Detroit, contains an editorial on the control of the city of New York, from which the following extract is suggestive:

"Control by the state should be demanded in America for the reason that here the police are the slave of the legislature, whereas in Europe they are shunned by such, owing to the fact that all institutions of this class are constantly under police supervision and without either check or side exit."

In a choice between two evils, one naturally turns to the lesser, and those members of society who are not swayed by fanaticism and rule or ruin sentiments, have long recognized that control presents the only definite and satisfactory solution of the problem. The plea that control tends to render vice "respectable," which is so constantly reiterated, is both specious and false. Vice can never be respectable, since when it attains that status it is no longer vicious; further, vice is made more respectable by being left alone than when subjected to control, and it is this which both vicious and criminal.

MR. McCULLOCH IN THE NEGATIVE.

In presenting the negative side of the question, Judge McCulloch said that he was opposed to the affirmative, and that it was difficult for him to go in that way. Mr. Rosewater would undertake to discuss it in the affirmative. He had supposed that the discussion would be on the negative side, and not go back to antiquity, as the discussion was before the Current Topic Club. Mr. Rosewater had said that the old law was obsolete, yet they seemed to be enforcing it. He was willing to go on record as declaring against the enforcement of certain laws. He was willing to go on record as declaring against the enforcement of certain laws. He was willing to go on record as declaring against the enforcement of certain laws.

Mr. Rosewater, said the judge, "has not cited a law that would be a wholesome one to have on the statute books in any city today. He says that the enforcement of them would not be tolerated, but that is an assertion, and not an argument. Let me read Webster's definition of an executive: